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Ravindran a/l Ramasamy v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–58 OF 2013
ABDULL HAMID EMBONG, SURIYADI, ZAINUN ALI, JEFFREY TAN AND AZAHAR MOHAMED FCJJ
22 SEPTEMBER 2014

C

Criminal Procedure — Charge — Duplicity of — Accused charged for offence under s 3A of Firearms (Increased Penalties) Act 1971 ('FIPA') read together with s 34 of the Penal Code — Charge described two offences or parts of two offences, one under s 3 (for principal offender) and the other under s 3A (for accomplices) of D *the FIPA — Whether accused misled and failure of justice occurred — Whether inclusion of s 34 of the Code in charge to be read together with offence under either s 3 or s 3A of the FIPA unknown to law — Whether defect in charge could not be saved by ss 156 or 422 of the Criminal Procedure Code — Whether accused's* E *conviction a nullity*

The High Court had convicted the appellant on a charge punishable under s 3A of the Firearms (Increased Penalties) Act 1971 ('the FIPA') read together with s 34 of the Penal Code ('the Code'). The charge stated that while they were F robbing a goldsmith's shop, the appellant together with another person ('Jayakumar'), who had since died, had discharged a shot from a firearm which could have caused death and that at the time the appellant knew Jayakumar had a gun in his custody or control. The Court of Appeal dismissed the appellant's appeal against conviction and sentence resulting in the instant appeal. According to the facts of the case, after the appellant and Jayakumar had G entered the goldsmith's shop and while the appellant was breaking the glass display cases to get at the jewellery, Jayakumar fired a shot from a gun he was holding. Again, when the shop's jeweller threw chairs and other things at them, Jayakumar had fired a shot at the jeweller but he missed. The duo then fled the scene with their loot. The appellant was later caught but Jayakumar was killed H in a shoot-out with police. In the instant appeal, the appellant argued that the charge was incurably bad for duplicity. The prosecution contended that since the appellant was able to put up a defence, he was neither misled nor prejudiced.

I

Held, allowing the appeal and setting aside the conviction and sentence:

(1) Under the FIPA, the person who discharged the firearm was the principal offender who was liable under s 3. An accomplice who was present and who might reasonably be presumed to have known that the person who

discharged the firearm had the weapon in his possession, custody or control was liable under s 3A unless he could prove he had taken all reasonable steps to prevent the discharge of the firearm. The charge against the appellant was for an offence under s 3A. Going by that section, the appellant was an accomplice and it should follow that the particulars of the offence would agree with the alleged fact the appellant was an accomplice. But that was not how the charge was framed. The instant charge alleged the appellant and Jayakumar had discharged a firearm. This was at odds with a charge under s 3A. At the same time, it alleged the appellant was aware that Jayakumar had a firearm in his custody or control, which was consistent with a charge under s 3A. Plainly, the instant charge described two offences or parts of two offences, one under s 3 and the other under s 3A. This ran foul of s 163 of the Criminal Procedure Code ('CPC') and the charge was bad for duplicity (see paras 12–13 & 15).

(2) As the particulars of the alleged offence straddled both ss 3 and 3A of the FIPA, the instant charge could not have given fair notice to the appellant of the section of the law against which the alleged offence was said to have been committed. The charge stated that s 3A had been offended. But as the particulars of the charge also pointed to another s 3 of the law being offended, it had to be seriously doubted that the mere mention of s 3A would have conveyed to the appellant that there was no other section of the law against which the alleged offence was said to have been committed. The mess in the charge was compounded by the inclusion of s 34 of the Code. With the induction of s 34, the instant charge gave notice to the appellant that the case against him was that the criminal act done by him and Jayakumar was as if it was done by him alone; in effect, that the discharge of the firearm was as if it was discharged by him (see paras 13 & 15).

(3) Sections 156 and/or 422 of the CPC could not save a defective charge where the accused was misled and a failure of justice had been occasioned. That the appellant would have been misled and that a failure of justice had been occasioned in the instant case was most apparent. The duplicity of the charges would certainly have misled the appellant. The omission in not stating the appellant's presence at the scene would have misled him into believing the case to answer was not for an offence under s 3A. That omission coupled with the error in stating that the appellant and Jayakumar had discharged a firearm could even have convinced the appellant that the case to answer was for an offence under s 3. The charge for an offence – s 3 read with s 34 or s 3A read with s 34 – was unknown in law. The conviction was a nullity. Clearly, there was a total failure in the administration of justice (see para 37).

(4) The instant charge could not have been the subject of separate charges that could have been proceeded with in one trial as a charge under s 3 would not have permitted a further charge under s 3A and vice versa. Under the FIPA, an offender could not be both principal offender and accomplice at the same time. So even if separate charges had been preferred, the appellant could not have been charged and tried under s 3 and s 3A (see para 23).

[Bahasa Malaysia summary

Mahkamah Tinggi telah mensabitkan perayu atas pertuduhan yang boleh dihukum di bawah s 3A Akta Senjata Api (Penalti Lebih Berat) 1971 ('FIPA') yang dibaca bersama-sama s 34 Kanun Keseksaan ('Kanun'). Pertuduhan ini menyatakan bahawa ketika mereka sedang merompak sebuah kedai emas, perayu bersama-sama dengan seorang lagi ('Jayakumar'), yang telah meninggal dunia, melepaskan tembakan daripada senjata api yang boleh menyebabkan kematian dan bahawa ketika itu, perayu mengetahui bahawa Jayakumar mempunyai senjata api dalam jagaan atau kawalannya. Mahkamah Rayuan menolak rayuan perayu terhadap sabitan dan hukuman yang membawa kepada rayuan ini. Menurut fakta kes, selepas perayu dan Jayakumar memasuki kedai emas dan semasa perayu memecahkan bekas paparan kaca untuk mengambil barang kemas, Jayakumar melepaskan tembakan daripada senapang yang dipegangnya. Sekali lagi, apabila tukang emas kedai membaling kerusi dan lain-lain pada mereka, Jayakumar melepaskan satu tembakan pada tukang emas tetapi tidak mengena. Kedua-duanya kemudian melarikan diri dari tempat kejadian dengan barang rampasan mereka. Perayu kemudiannya ditangkap tetapi Jayakumar terbunuh dalam kejadian tembak-menembak dengan polis. Dalam rayuan ini, perayu menghujahkan bahawa pertuduhan tidak boleh diperbetulkan kerana kependuaan. Pihak pendakwaan menghujahkan bahawa kerana perayu boleh membela diri, dia tidak mengelirukan atau diprejudiskan.

Diputuskan, membenarkan rayuan dan mengetepikan sabitan dan hukuman:

(1) Di bawah FIPA, orang yang melepaskan senjata api adalah pesalah utama yang bertanggungan di bawah s 3. Rakan sejenayah yang ada bersama dan boleh dianggap, secara munasabah, mengetahui bahawa orang yang melepaskan senjata api mempunyai senjata di dalam milikan, jagaan atau kawalannya bertanggungan di bawah s 3A melainkan jika dia dapat membuktikan dia telah mengambil segala langkah munasabah untuk menghalang pelepasan senjata api tersebut. Pertuduhan terhadap perayu adalah bagi kesalahan di bawah s 3A. Jika mengikut seksyen itu, perayu adalah rakan subahat dan harus dituruti bahawa butir-butir kesalahan menyokong fakta bahawa perayu adalah rakan subahat. Tetapi itu bukanlah cara pertuduhan dirangka. Pertuduhan ini mendakwa bahawa perayu dan Jayakumar telah melepaskan senjata api. Ini bertentangan

dengan pertuduhan di bawah s 3A. Pada masa yang sama, perayu dikatakan sedar bahawa Jayakumar mempunyai senjata api dalam jagaan atau kawalannya, yang konsisten dengan pertuduhan di bawah s 3A. Jelas pertuduhan ini menerangkan dua kesalahan atau seksyen-seksyen dua kesalahan, salah satunya di bawah s 3 dan satu lagi di bawah s 3A. Ini bertentangan dengan s 163 Kanun Tatacara Jenayah ('KTJ') dan cacat kerana mempunyai kependuaan (lihat perenggan 12–13 & 15).

(2) Oleh kerana butir-butir kesalahan terletak pada kedua-dua ss 3 dan 3A FIPA, pertuduhan ini tidak membeli notis yang adil kepada perayu mengenai seksyen undang-undang yang mana yang kesalahan tersebut didakwa telah dilakukan. Pertuduhan menyatakan bahawa s 3A telah dilanggar. Namun, oleh kerana butir-butir pertuduhan menunjukkan s 3 yang lain telah dilanggar, ia perlu diragui secara serius bahawa sebutan s 3A semata-mata akan menyampaikan kepada perayu bahawa tidak ada seksyen lain dalam undang-undang yang memperihalkan kesalahan yang dikatakan telah dilakukan itu. Huru-hara dalam pertuduhan diburukkan lagi dengan kemasukan s 34 Kanun. Dengan induksi s 34, pertuduhan ini memberi notis kepada perayu bahawa kes terhadapnya adalah bahawa perbuatan jenayah yang dilakukan olehnya dan Jayakumar seolah-olah dilakukan seorang diri; hakikatnya, bahawa pelepasan senjata api seolah-olah dilakukan olehnya (lihat perenggan 13 & 15).

(3) Seksyen 156 dan/atau 422 KTJ tidak dapat menyelamatkan pertuduhan cacat jika tertuduh telah terkeliru dan berlaku ketidakadilan. Dalam kes ini, jelas bahawa perayu akan keliru dan ketidakadilan telah berlaku. Kependuaan pertuduhan pasti dapat mengelirukan perayu. Peninggalan dalam tidak menyatakan kehadiran perayu di tempat kejadian mengelirukan di mana dia mempercayai kes untuk dijawab bukanlah bagi suatu kesalahan di bawah s 3A. Peninggalan ini ditambah dengan kesilapan dalam menyatakan bahawa perayu dan Jayakumar telah melepaskan senjata api juga boleh meyakinkan perayu bahawa kes untuk dijawab adalah bagi kesalahan di bawah s 3. Pertuduhan bagi suatu kesalahan – s 3 dibaca bersama-sama s 34 atau s 3A dibaca bersama-sama s 34 – tidak diketahui di bawah undang-undang. Sabitan ini terbatal. Jelas terdapat sejumlah kegagalan dalam pentadbiran keadilan (lihat perenggan 37).

(4) Pertuduhan ini tidak boleh menjadi subjek pertuduhan berasingan yang mungkin telah diteruskan dalam satu perbicaraan kerana pertuduhan di bawah s 3 tidak akan membenarkan pertuduhan lanjut di bawah s 3A dan sebaliknya. Di bawah FIPA, seseorang pesalah tidak boleh menjadi kedua-dua pesalah utama dan rakan sejenayah pada masa yang sama. Oleh itu, walaupun pertuduhan berasingan dipilih, perayu tidak boleh didakwa dan dibicarakan di bawah ss 3 dan 3A (lihat perenggan 23).]]

Notes

For cases on duplicity of charge, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 1453–1479.

Cases referred to

C Mohammad v PP [1974] 1 MLJ 25 (refd)
Cheong Sik Kwan v PP [1959] 1 MLJ 189, CA (refd)
Chong Chee Pak v PP [1948-1949] supp MLJ 45 (refd)
Haji Abdul Ghani bin Ishak & Anor v PP [1981] 2 MLJ 230, FC (refd)
Hazraf Ali bin Hassan v PP [2012] 7 MLJ 355, HC (refd)
Jagar Singh v PP [1936] 1 MLJ 92 (refd)
Jemmison v Priddle [1972] 1 All ER 539, QBD (refd)
Krishnan & Anor v PP [1981] 2 MLJ 121, FC (refd)
Lee Chin Kee v PP [1935] MLJ 157; [1935] FMSLR 33 (refd)
Lee Swee Tee v PP [1960] 1 MLJ 161 (refd)
Low Seng Wah v PP [1962] 1 MLJ 107 (refd)
PP v Mohamad bin Sabu [2012] 7 MLJ 547, HC (refd)
PP v Lee Pak [1937] 1 MLJ 265 (refd)
PP v Mahfar bin Sairan [2000] 4 MLJ 791, HC (refd)
PP v Mohamed Fathi bin Haji Ahmad [1979] 2 MLJ 75 (not folld)
Periasamy & Anor v PP [1993] 2 MLJ 551, HC (refd)
Quek Ching Kim v Reg [1956] 1 MLJ 54 (refd)
Ravindran a/l Ramasamy v PP [2013] 4 MLJ 665, CA (refd)
R v Wilmot (1933) 24 Cr App Rep 63, CA (refd)
King v Surrey Justices ex parte Witherick, The [1932] 1 KB 450 (refd)
Saw Tuan Cheong v PP [1946] 1 MLJ 143 (refd)
See Yew Poo v PP [1949] 1 MLJ 131 (not folld)
Shawal bin Hj Mohd Yassin v PP [2006] 4 MLJ 334, HC (refd)
Tai Chai Keh v PP [1948-1949] supp MLJ 105b, CA (refd)
Tay Leong Siak v PP [2002] MLJU 197, HC (refd)
Teng Kum Seng v PP [1960] 1 MLJ 225 (refd)
Teo Peng Chow & Ors v PP [1957] 1 MLJ 118 (refd)
Yap Sing Hock & Anor v PP [1992] 2 MLJ 714, SC (refd)
Yap Liow Swee v PP [1937] 1 MLJ 225 (not folld)

Legislation referred to

Code of Criminal Procedure [IND] s 215
Common Gaming Houses Ordinance 1953
Criminal Procedure Code ss 152, 153, 154, 156, 163, 164, 165, 166, 170, 321, 422
Firearms (Increased Penalties) Act 1971 ss 3, 3A
Penal Code s 34

Mohd Shafee bin Abdullah (Shafee & Co) for the appellant.

Nahra bt Dollah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Jeffrey Tan FCJ (delivering judgment of the court):

[1] The appellant was tried and convicted by the High Court for the following two offences:

> Bahawa kamu bersama-sama seorang lagi yang telah meninggal dunia, pada 14 Januari 2008, jam lebih kurang 11.00 pagi, di Kedai Emas Gayanthrii Tangga Maligai Jewellers, No 42 Lebuh Pasar, dalam Daerah Timur Laut, dalam Negeri Pulau Pinang, telah melepaskan tembakan yang boleh menyebabkan kematian semasa melakukan rompakan di mana kamu mengetahui rakan sejenayah tersebut ada di bawah jagaan atau kawalannya senjata api dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 3A Akta Senjatapi (Penalti Lebih Berat) 1971 yang boleh dihukum di bawah seksyen yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

[2] Against conviction and sentence for the offence under s 3A of the Firearms (Increased Penalties) Act 1971 ('the FIPA'), the appellant appealed, but in vain, to the Court of Appeal (see *Ravindran a/l Ramasamy v Public Prosecutor* [2013] 4 MLJ 665). The appellant appealed to this court. On 22 September 2014, we unanimously allowed the appeal and set aside the said conviction and sentence. We now give our reasons.

[3] At 11am on 14 January 2008, the appellant and one Jayakumar a/l Muniady ('Jayakumar') entered the premises of 'Kedai Emas Gayathrii Tangge Mahligai Jewellers' of 42 Lebuh Pasar, District of Timur Laut, with the intention to commit robbery. Once inside the jewellers' premises, the appellant proceeded, with a hammer, to smash the glass display cases/cabinets. At about the same time, Jayakumar discharged a shot from the gun in his hand. Both appellant and Jayakumar, who wore gloves, then grabbed the jewellery from the broken display cases/cabinets. But they encountered resistance from the jeweller ('PW3') who threw chairs and other utensils at them. Jayakumar shot at PW3 but missed. Jayakumar and the appellant then bolted from the scene. But the appellant was apprehended not far from the jeweller's premises. Jewellery that belonged to PW3 was found on the appellant. As for Jayakumar, he made good his escape, only to be later killed in a separate shoot-out with the police on 17 March 2009. Those were the primary facts that the prosecution adduced at the trial against the appellant, and upon which the appellant was convicted for an offence under s 3A of the FIPA.

[4] In his written submission, learned counsel for the appellant categorically accepted those primary facts as established facts. But learned counsel orally submitted that the charge was bad for duplicity, and that the defective charge

could not be cured by s 422 of the Criminal Procedure Code ('the CPC'). The learned deputy prosecutor cited s 156 of the CPC and replied that the appellant who was able to put up his defence was therefore not misled, and that no prejudice had been occasioned.

[5] Section 163 of the CPC provides that 'for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in Sections 164, 165, 166 and 170'. Duplicity is not allowed (*Jagar Singh v Public Prosecutor* [1936] 1 MLJ 92). As regards duplicity, the leading English authority on the subject is the case of *R v Wilmot* (1933) 24 Cr App Rep 63, at p 63 where the Lord Chief Justice quotes with approval the following passage from the judgment of Avory J in *The King v Surrey Justices ex parte Witherick* [1932] 1 KB 450 at p 452: 'It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged, and of what he is convicted, and may be prevented on a future occasion from pleading 'autrefois convict" (*Yap Liow Swee v Public Prosecutor* [1937] 1 MLJ 225). 'A charge is only bad for duplicity when it alleges facts constituting two different activities; it is legitimate to charge in a single charge one activity even though that activity might involve more than one act' (*Jemmison v Priddle* [1972] 1 All ER 539 per Lord Widgery CJ).

[6] Latent duplicity is committed when a single charge describes more than one offence. 'Latent duplicity (also called 'latent ambiguity' or 'latent uncertainty') [is] where a single charge alleges the commission of only one offence, but the evidence led by the prosecution in relation to the charge discloses a number of separate offences, all of which could fit the allegation described in the charge' (updates on legal developments by the Victorian Government Solicitor's Office dated 28 April 2014: 'Double or nothing' – The rule against duplicity in charging criminal offences). But to establish duplicity in a charge, it is not enough to show that the section or paragraph under which the accused is charged contemplated two offences; it is necessary to go further and show that both offences have been included in the same charge, thus embarrassing the accused in his defence and making it impossible for him to plead autrefois convict in respect of either of the alternatives (*Saw Tuan Cheong v Public Prosecutor* [1946] 1 MLJ 143). Ambiguity and latent duplicity in the charge must be such as to have caused a miscarriage of justice (*Tai Chai Keh v Public Prosecutor* [1948-1949] supp MLJ 105b).

[7] Apart from the rule against duplicity, the CPC also stipulates the form in which criminal charges are to be framed. Sections 152–154 of the CPC provide:

Section 152

(1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) If the accused has been previously convicted of any offence, and it is intended to prove that previous conviction for the purpose of increasing the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. If the statement is omitted the Court may add it at any time before sentence is passed.

ILLUSTRATIONS

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Section 153

(1) The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 164:

Provided that the time included between the first and last of such dates shall not exceed one year.

(3) When the accused is charged with an offence relating to publication by electronic means, the place of publication is where the publication is seen, heard or read by any person.

Section 154

When the nature of the case is such that the particulars mentioned in sections 152 and 153 do not give the accused sufficient notice of the matter with which he is

charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

[8] Section 152 of the CPC provides that the charge shall 'state the offence with which the accused is charged' and mention 'the law and section of the law against which the offence is said to have been committed'. Section 153 of the CPC provides that 'the charge shall contain such particulars as to the time and place of the alleged offence … as are reasonably sufficient to give the accused notice of the matter with which he is charged'. And when the nature of the case is such that the particulars mentioned in ss 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, s 154 of the CPC provides that 'the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose'.

[9] The instant charge read that the appellant and another person who had since died, in the course of the commission of the scheduled offence of robbery at the stated place and time, discharged a firearm with intent to cause death or hurt and with knowledge that his accomplice had in his custody or control the firearm, and that the appellant had thereby committed an offence under s 3A of the FIPA and punishable under the same said section read together with s 34 of the Penal Code.

[10] Section 3 of the FIPA provides:

> Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause death or hurt to any person, shall, notwithstanding that no hurt is caused thereby, be punished with death.

[11] Section 3A of the FIPA provides:

> Where, with intent to cause death or hurt to any person, a firearm is discharged by any person at the time of his committing or attempting to commit or abetting the commission of a scheduled offence, each of his accomplices in respect of the offence present at the scene of the commission or attempted commission or abetment thereof who may reasonably be presumed to have known that such person was carrying or had in his possession or under his custody or control the firearm shall, notwithstanding that no hurt is caused by the discharge thereof, be punished with death, unless he proves that he had taken all reasonable steps to prevent the discharge.

[12] 'Under this section [3A] an accomplice who is liable for the offence is one who was not only present, but was also 'reasonably presumed to have known that the principal offender was carrying or had in his possession or under his custody or control a firearm' (*Krishnan & Anor v Public Prosecutor*

[1981] 2 MLJ 121 at p 122, per Salleh Abas FJ, as he then was, delivering the judgment of the court) but has not taken all reasonable steps to prevent the discharge of the firearm. Under the FIPA, the person who discharged the firearm is the principal offender who is liable under s 3. An accomplice who was present and who may reasonably be presumed to have known that the person who discharged the firearm had in his possession or under his custody or control the firearm is liable under s 3A, unless he proves that he had taken all reasonable steps to prevent the discharge of the firearm.

[13] That said, the charge against the appellant was for an offence under s 3A. Going by that section of the law, the appellant was an accomplice and it should follow that the particulars of the offence would agree with the alleged fact that the appellant was an accomplice. But that was not how the instant charge was framed. The instant charge alleged that the appellant and Jayakumar discharged a firearm ('Bahawa kamu bersama-sama seorang lagi yang telah meninggal dunia, pada 14 Januari 2008, jam lebih kurang 11.00 pagi, di Kedai Emas Gayanthrii Tangga Maligai Jewellers, No 42 Lebuh Pasar,dalam Daerah Timur Laut, dalam Negeri Pulau Pinang, telah melepaskan tembakan yang boleh menyebabkan kematian semasa melakukan rompakan'), which was at odds with a charge under s 3A. At the same time, the instant charge also alleged that the appellant was aware that Jayakumar had in his custody or control a firearm ('di mana kamu mengetahui rakan sejenayah tersebut ada di bawah jagaan atau kawalannya senjata api'), which was consistent with a charge under s 3A. Section 153 of the CPC required that 'the charge shall contain such particulars as to the time and place of the alleged offence ... as are reasonably sufficient to give the [Appellant] notice of the matter with which he is charged'. But given that the particulars of the alleged offence straddled both ss 3 and 3A, it would not seem that the instant charge could have given fair notice to the appellant of the section of the law against which the alleged offence was said to have been committed. 'The real test in all these cases is whether the accused person gets sufficient certain notice of what is charged against him' (*Teng Kum Seng v Public Prosecutor* [1960] 1 MLJ 225 per Thomson CJ). The instant charge might have stated that s 3A was offended. But as the particulars of the instant charge also pointed to another s 3 of the law being offended, it must be seriously doubted that the mere mention of s 3A would have conveyed to the appellant that there was no other section of law against which the alleged offence was said to have been committed.

[14] To the contrary, the particulars in the instant charge could even have conveyed that the section of law against which the alleged offence was said to have been committed was s 3. One essential ingredient of a s 3A offence is the presence of the accomplice at the scene of the commission or attempted commission or abetment of the scheduled offence. But the presence of the appellant at the scene was not stated in the instant charge, which should not be

so if the section of law against which the alleged offence was said to have been committed were s 3A. On the other hand, the fact of the appellant being at the scene needed not be stated if the section of law against which the alleged offence was said to have been committed were s 3. Suffice it to say that the instant charge was at sixes and sevens. While it stated that the section of the law against which the alleged offence was said to have been committed was s 3A, it also pointed to s 3.

[15] The mess in the instant charge was compounded by the fact that it stated that the section of law against which the alleged offence was said to have been committed was to be read together with s 34 of the Penal Code, which s 34 provides that 'when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone'. Section 34, which was and is an evidential provision, was not an ingredient of the alleged offence. But with the induction of s 34, the instant charge gave notice to the appellant that the case against him was that the criminal act done by him and Jayakumar was as if was done by him alone. In effect, the notice to the appellant was that the discharge of the firearm was as if it were discharged by him. The instant charge also alleged that the appellant was aware that Jayakumar had in his custody or control a firearm. Plainly, the instant charge described two offences or parts of two offences, one under s 3 and the other under s 3A, which ran foul of s 163 of the CPC, and was therefore bad for duplicity.

[16] 'One trend in judicial opinion that is discernible in the cases cited is that the courts are more ready to impugn a charge as bad for duplicity where it contains more than one offence in the alternative' (*Haji Abdul Ghani bin Ishak & Anor v Public Prosecutor* [1981] 2 MLJ 230 per Raja Azlan Shah CJ (Malaya), as HRH then was, delivering the judgment of the court). So it was held by Howes J in *Jagar Singh*, who pointedly disagreed with Sir Samuel Thomas CJ in *Lee Chin Kee v Public Prosecutor* [1935] MLJ 157; [1935] FMSLR 33 in which the learned Chief Justice held that a charge which offends s 163 is not a mere irregularity but an illegality:

> In view of the express provisions of the Criminal Procedure Code s 163, that for every distinct offence there shall be a separate charge, I hold that the trial of the accused for the two distinct offences contemplated in s 46(i) of the Motor Vehicles Enactment (Cap 168) in one charge was not a mere irregularity, but was an illegality, and for this reason the conviction must be quashed, and the fine repaid to the defendant.

[17] Thomson CJ, delivering the judgment of the court in *Cheong Sik Kwan v Public Prosecutor* [1959] 1 MLJ 189, agreed that the contravention of s 163 of the CPC is an illegality that cannot be cured, and that any conviction cannot be sustained:

As in the case of *Babulal v Emperor* AIR 1938 PC 130; 65 IA 158; 174 IC 1 (PC) it is not necessary to discuss here the precise scope of what was decided in the case of *Subramania Ayyar v King Emperor*, but that case clearly did decide that where charges are tried together in contravention of any of the provisions of the Criminal Procedure Code there is an illegality which cannot be cured and that any convictions had cannot be sustained.

The provisions of the Code which are relevant here are contained in ss 163, 164, 165 and 170 corresponding to ss 233, 234, 235 and 239 of the Indian Code.

[18] There is a line of authority which espoused the view that where each of the offences could have been the subject of a separate charge, and could have been proceeded with at one trial, the duplicity was an irregularity which could be cured by s 422 of the CPC, provided that the accused was not prejudiced and there was no failure of justice occasioned by the irregularity.

[19] In *Yap Liow Swee v Public Prosecutor* [1937] 1 MLJ 225 Terrell J stated as follows:

The cases there dealt with are cases of separate offences contained in a single charge, where the prosecution set out to prove each of such offences, and each offence could have been the subject of a separate charge. This has been held in British India to be an irregularity which is curable, unless it can be shown that the accused has been prejudiced in that there has been a failure of justice, under a section which corresponds to s 422 of the Federated Malay States Criminal Procedure Code. But in a case like the present the prosecution do not set out to prove both recklessness and negligence, but merely one or the other. Accordingly the accused is embarrassed in his plea, and if he is convicted he is left in doubt as to the offence of which he has been convicted.

[20] Terrell J was quoted with approval in *See Yew Poo v Public Prosecutor* [1949] 1 MLJ 131, where Russell J, delivering the judgment of the court, thus summed it:

We are therefore of the opinion that, as in the present case each of the offences could have been the subject of a separate charge, and could have been proceeded with at one trial, the duplicity was merely an irregularity which can be cured under the provision of s 422 provided that the accused was not prejudiced and there was no failure of justice occasioned by the irregularity.

[21] In *Public Prosecutor v Mohamed Fathi bin Haji Ahmad* [1979] 2 MLJ 75, the issue was as to the correctness of the following charge:

That you sometime between the 16th day of August, 1977 and 26th day of September, 1977 at the Chase Manhattan Bank, Jalan Gereja, Wilayah Persekutuan, Kuala Lumpur, fraudulently used as genuine four documents, to wit, Waran Perjalanan Udara Awam Nos. 9036, 9089, 19032 and No. 19040, which you knew to be forged documents and that you thereby committed an offence

under section 471 and punishable under section 465 of the Penal Code.

[22] Harun J, as he then was, held that the accused was not prejudiced and there had not been a failure of justice and that the charge, though bad for duplicity, was an irregularity which was cured by s 422.

> Here the facts disclose that the offences were committed on three separate occasions, two warrants having been presented to the bank at the same time on the third occasion. True the modus operandi was the same in respect of all the offences committed by the same person against the same bank but the evidence required to prove each charge need not necessarily be the same in all cases. The only exception to the rule of one offence one charge is contained in s 153(ii) in regard to the offence of criminal breach of trust or dishonest misappropriation of property committed over a period of one year or less. This is the only instance when several offences may be telescoped into a single charge. Although the rule of one offence one charge is precise, it does not follow that there should be separate trials for each charge as there are provisions when several offences may be tried at one trial: see *Cheong Sik Kwan v Public Prosecutor* [1959] 1 MLJ 189 where the Court of Appeal dealt fully with all these provisions. The charge as it stands is therefore bad for duplicity on two counts viz it contravenes s 153 for not stating the time each offence was alleged to have been committed and it contravenes s 163 because it is alleged in a single charge the commission of four distinct offences
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> ...
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> The question then is whether the failure to comply with s 163 is an illegality or an irregularity. In *See Yew Poo v Public Prosecutor* [1949] 1 MLJ 131, the Court of Appeal held that if 'each of the offences could have been the subject of a separate charge, and could have been proceeded with at one trial, the duplicity was merely an irregularity which can be cured under the provision of s 422 provided that the accused was not prejudiced and there was no failure of justice occasioned by the irregularity'. In the instant case ... if the prosecution had proceeded with the three amended charges there would have been only one trial. I am satisfied that the accused was neither prejudiced nor has there been a failure of justice and I accordingly hold that the charge though bad for duplicity is an irregularity which is cured by s 422.

[23] But even if so, the instant charge could not have been the subject of separate charges that could have been proceeded with in one trial, as a charge under s 3 would not permit a further charge under s 3A, and vice versa. Under the FIPA 1971, an offender could not be both principal offender and accomplice at the same time. So even if separate charges could be preferred, the appellant could not be charged and tried under ss 3 and 3A. Hence, *Yap Liow Swee v Public Prosecutor* and the authorities that followed it, could not apply to save the instant charge.

[24] But could ss 156 or 422 of the CPC save the instant charge?

[25] Section 156 of the CPC provides:

> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.

[26] Section 422 of the CPC provides:

> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of–
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence,
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[27] Pursuant to s 156 of the CPC, 'no error in stating the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission' (the Indian equivalent, s 215 of the Indian Criminal Procedure Code, ends with the words 'and it has occasioned a failure of justice'). However, in view of s 422, for an error or omission to be material, it is not enough that the accused has been misled; there must also be a failure of justice. 'Whether any court should apply s 422 aforesaid will depend, among other things, on whether the irregularity involves the breach of a principle of general importance to the administration of criminal justice. If it does, the court would not apply s 422, as this appears to us to be the same thing as the irregularity having occasioned a failure of justice' (*Yap Sing Hock & Anor v Public Prosecutor* [1992] 2 MLJ 714 at p 725 per Peh Swee Chin SCJ, later FCJ, delivering the judgment of the court).

[28] It could also be noted that the 'error' alluded to in s 156 of the CPC is the error in stating the offence or the particulars required to be stated in the charge, and not the error in stating the ingredients of an offence. That important distinction, whether an error in stating the particulars or an error in stating the ingredients, must be drawn for the purposes of ss 156 and/or 422 of the CPC. This is because where it was an error or omission in stating the ingredients of an offence, it had been consistently held by the courts that the accused would have been misled and that there must have been a failure of justice. *Low Seng Wah v Public Prosecutor* [1962] 1 MLJ 107, was the

exceptional case, where Neal J held that the omission of an essential ingredient in the charge was not fatal, because of the unique provisions of s 321 of the CPC (since repealed) which provided that 'No judgment, sentence or order of magistrate court shall be reversed or set aside unless it is shown to the satisfaction of the court of a judge that such judgment, sentence or order was either wrong in law or against the weight of the evidence'. *Low Seng Wah v Public Prosecutor*, which was primarily decided under s 321, is no precedent on s 156 of the CPC.

[29] But in cases decided primarily under ss 156 and/or 422 of the CPC, courts had refused to invoke those provisions where it was an error or omission in stating the ingredients of an offence.

[30] In *Public Prosecutor v Mahfar bin Sairan* [2000] 4 MLJ 791, Kang Hwee Gee J, as he then was, drew attention to the vast difference between the ingredients of an offence as opposed to the particulars of the act, and the need to distinguish between the ingredients of an offence and its mere particulars:

> Steven A Hirsch, in an article entitled *'Yap Sing Hock v PP: Time for a quick and Decent Burial'* [1993] 3 MLJ Lexis, draws a distinction between the elements (or what is more commonly described in courts as ingredients and mere particulars and pointed out that a charge is bad only where the element specified therein had prejudiced the accused under the fair notice rule. He wrote at p lxxvii of his article which he fortified by reference to numerous case decisions, which I have no reason to doubt as correctly representing the law:
>
> > The court failed to appreciate that every criminal charge contain two distinct types of averment: (i) a recitation of or reference to the elements (or 'ingredients') of the underlying statutory offence; and (ii) particulars which are not themselves elements of the underlying offence but which 'flesh out' the details of the allege crime. The first sort of averment, as the court correctly pointed out, is subject to the rule of strict construction in favour of liberty.

[31] The other case where the court drew the distinction between particulars and ingredients was *Shawal bin Hj Mohd Yassin v Public Prosecutor* [2006] 4 MLJ 334, where it was held by Azahar Mohamed JC, as he then was, that ss 156 and 422 of the CPC only cure technical errors. Azahar Mohamed JC also enunciated on 'miscarriage of justice' and 'prejudice' in the context of ss 156 and 422 of the CPC, which enunciation we approve and now reproduce below in extenso:

> In my view s 156 has application only in a situation where there is an error either in stating the offence or the particulars required to be stated in the charge or there is an omission to state the offence or those particulars. In other words that section provides for a cure should there be any non-compliance with the technical provisions of the law. I do not think that provision can be invoked in the case at hand in a situation where the charge was defective as disclosing no offence under the

section of the Act. I do not consider that this is an irregularity curable under s 156. In the same way, the application of s 422 is constrained to remedy no more than technical defects in the charge. To me where a trial in the court below is conducted on the basis of a charge which is defective as not disclosing an offence under the relevant section, it is an illegality which cannot be cured by s 422. I should point out that the case of *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314 relied on by the learned deputy is distinguishable on its facts ... In stark contrast to that case, in the case before me it was not a minor defect; the charge was defective as disclosing no offence in law.

The defect in the charge was a matter of substance and not merely of form. This was not a mere technical non-compliance of any provision of the law which can be condoned as an irregularity. I do not think it can be cured without causing injustice to the appellant. In my view, this was not a defect, disregarding it would not occasion a miscarriage of justice. To me the charge as framed did not disclose any offence and therefore I have no doubt that the defect of this kind was an illegality. I think the appellant was left in doubt as to the offence of which he had been convicted and sentenced. It is a fundamental principle of criminal law in our country that an accused person should know accurately of what offence he has been convicted and sentenced. In my judgment the error in the charge did cause prejudice and injustice to the appellant. In the end, I have no hesitation in saying that the charge framed against the appellant was bad in law. When looked in this way, one can see that there has been a substantial miscarriage of justice. As a consequence, the conviction in this case was a nullity.

[32] The following cases did not draw the distinction between particulars and ingredients. But they nonetheless exemplify that ss 156 and/or 422 would not be invoked to cure an error or omission in stating the ingredients of an offence.

[33] In *Chong Chee Pak v Public Prosecutor* [1948-1949] supp MLJ 45, where the appellant was convicted on a charge of 'assisting in the management of a public lottery', an offence not known in law, Callow J held that the conviction was a nullity (see also *Quek Ching Kim v Reg* [1956] 1 MLJ 54 and *Lee Swee Tee v Public Prosecutor* [1960] 1 MLJ 161, where the respective charge under the Common Gaming Houses Ordinance 1953 was similarly wrongly worded, and where the conviction was either quashed and or set aside).

[34] In *Teo Peng Chow & Ors v Public Prosecutor* [1957] 1 MLJ 118, Buhagiar J said that where there was an error in the ingredients of the charge, it could not be said that the accused was not misled:

The next point to consider is whether this error in the charge is material or not and whether the provisions of s 156 of the Criminal Procedure Code applies. Under that section an error in a charge is not material unless the accused was in fact misled by such error or omission. It seems from the grounds of judgment of the learned magistrate that he did not consider the words in the charge referred to above were an

essential ingredient in an offence under s 10 but he did not amend the charge at the close of the case for the prosecution and at that stage counsel for the defendant submitted that there was no case to answer on the ground that there was 'no evidence to show that the accused managed or assisted in the management of the club and no evidence that all three accused arranged a meeting on behalf of the club'. Under the circumstances I do not think it can be said that the appellants were not misled by the error in the charge. I, therefore, set aside the conviction and sentence and order re-trial before another magistrate.

[35] And in *C Mohammad v Public Prosecutor* [1974] 1 MLJ 25, Syed Agil Barakbah J as he then was, held that as the charge disclosed no offence known to law, it was not 'necessary nor desirable for me to consider the provisions of the Criminal Procedure Code as urged by the learned deputy public prosecutor because there [was] an apparent miscarriage of justice'.

[36] Other like cases, where the charge disclosed no known offence and where the conviction was quashed and or set aside, were (i) *Periasamy & Anor v Public Prosecutor* [1993] 2 MLJ 551, (ii) *Tay Leong Siak v Public Prosecutor* [2002] MLJU 197, where the charge did not follow the wording of the law that created the offence, and where Lop Hop Bing J, as he then was, said that the charge was so defective as to render it an illegality such that it was impossible to invoke ss 156 and 422 of the CPC, (iii) *Hazraf Ali bin Hassan v Public Prosecutor* [2012] 7 MLJ 355, where Akhtar Tahir J held that s 156 does not apply where the defect in the charge does not disclose any known offence, and that the accused was 'prejudiced by prejudiced by being ignorant of the actual nature of the offence committed by him. As such he would be unable to properly defend himself', and (iv) *Public Prosecutor v Mohamad bin Sabu* [2012] 7 MLJ 547, where Zamani A Rahim J held that the omission of ingredient is a fundamental defect that could not be cured by s 422. Evidently, recent authority would not agree with *Public Prosecutor v Lee Pak* [1937] 1 MLJ 265, where the essential ingredients of the offence were missing, but it was held by Whitley Ag CJ that the errors were covered by s 156 as it was not alleged that the accused was misled.

[37] Sections 156 and/or 422 of the CPC would not save a defective charge where the accused was misled and a failure of justice had occasioned. In the instant case, that the appellant would have been misled and that a failure of justice would have been occasioned was most apparent. The duplicity of charges would certainly have misled the appellant. The omission in not stating the presence of the appellant at the scene would have misled him to believe that the case to answer was not for an offence under s 3A. Rather, the omission in not stating the presence of the appellant at the scene coupled with the error in stating that the appellant and Jayakumar discharged a firearm, could even have convinced the appellant that the case to answer was indeed for an offence under s 3. The charge for an offence – s 3 read with s 34 and/or s 3A read with s 34 –

is unknown in law. The conviction was a nullity. Clearly, there was a total failure in the administration of justice, which could only be put right by an order in favour of liberty of the subject.

[38] It was for the aforesaid reasons that we allowed the appeal and set aside the conviction and sentence.

Appeal allowed and conviction and sentence set aside.

Reported by Ashok Kumar